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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

THEODORE BENTZ,
Petitioner,
vs.
THE STATE OF MICHIGAN,
Respondent.

No. 247

APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN REPLY TO RESPONDENT'S BRIEF

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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OPPOSING PETITION FOR WRIT OF CERTIORARI

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

May it please the Court:

Comes now Theodore Bentz, petitioner, in the above entitled cause, to reply to a certain number of respondent's unfounded assertions:

(I)

"COUNTER-STATEMENT OF MATTERS INVOLVED"

Obviously counsel for respondent is not familiar with all the facts and law applicable to this case. On page 2

of his brief he alleges petitioner was represented by "competent" counsel during trial.

It is not a question of whether counsel was "competent". It is a question of whether counsel protected petitioner's rights deemed fundamental by the Constitution. The fact remains that petitioner's trial attorney carelessly allowed the case to go to trial without preparing therefor. The record is *prima facie* evidence of that.

Courts must recognize matters of record. In order to complete the jurisdiction of the trier court, counsel must be prepared or demand time within which to acquaint himself with facts, evidence and issues involved in the case. Otherwise the concept of due process is not satisfied.

On the same page, respondent's counsel, exploiting subterfuge, plainly attempts to cast aside habeas corpus procedure as if the privilege of habeas corpus is not available by alleging "the doors of the trial court are never closed to a convicted person who seeks a new trial, * * *." He infers blandly that a motion for leave to file a motion is the key to those doors. Granted, if one has the key to fit the locks, and the trial judge jams the mechanism thereof, what good is the key?

Respondent asserts "lengthy investigation" was made prior to Dec. 31, 1938. By whom? Investigation made by Lieut. P. L. Hutson of the Michigan state police in the matter, result of which proved favorable to petitioner, was "pooh-poohed" by the trial judge when he considered the first motion.

Four years later he wrote Commissioner Olander of the Michigan state police who replied: "While alive, Lieut. Hutson mentioned several times that he did not believe Ted Bentz (petitioner) was in on the Grand Haven bank robbery" (See p. 104, New Evidence). This, too, was given neither credence nor recognition by the pertinacious trial judge, notwithstanding its eminent source.

On page 5, respondent alleges the state court "observed petitioner did not raise any question of jurisdiction of person or subject-matter; * * *."

Where a convicted person claims divestation of a right deemed fundamental by Constitution, it is not necessary for him to set out — in lengthy detail — that the trier court was without jurisdiction of person or subject-matter. For the court before which he is tried to deny, divest, curtail, abridge or fail to protect a constitutional right of the accused is sufficient to nullify its jurisdiction.

Moreover, whether petitioner "made any showing which would constitute a ground for granting habeas corpus" is no answer. Under the statute in Michigan and its own interpretations thereof as well as under the federal code and that of several states, the State courts must first issue the writ and then decide the matter according to its merits. To deny a petition for habeas corpus without issuing the writ is not the purpose of the procedure. Nor is it due process. For no jurist, no matter how much his law clerks have told him, can legally determine habeas corpus until he issues the writ and personally delves into the facts and subject-matter, including record and new evidence, together with evidence, if any, *dehors* the record.

(II)

"QUESTIONS PRESENTED"

Respondent under this caption sets out two questions. Answer to the first is that the State has not afforded petitioner with "the privilege of habeas corpus". But has, rather, obtundly denied him relief without so much as issuing the writ to ascertain whether the aggregate claims constituted a jurisdictional inquiry. Consequently, a violation of the U. S. Constitution.

The answer to the second question is that it appears the supreme court of Michigan shirked its duty to carefully read and examine the "voluminous" documents to sift out the merits in the matter. Unfortunately, there are among those serving the public men who often frown upon a laborious job. And, to alleviate the labor facing them, fall into the habit of circumventing the thing by mere adversative, dissident opinion. In his application for habeas corpus addressed to the supreme court of Michigan, petitioner set forth a host of grounds to justify granting of a writ of habeas corpus.

(III)

"COUNTER-STATEMENT OF FACTS"

On page 6 of respondent's brief, counsel annotates the erroneous theory that petitioner "may have had benefit of disbarred counsel *intra muros*, * * *". Petitioner denies such inference. Not being up to his usual standard when having prepared his procedure, petitioner would certainly welcome the privilege of being brought before this honorable tribunal to argue law and facts in the case in person.*

* See page 39, printed petition.

(1)

"PRETRIAL PROCEEDINGS"

Matter of counsel already has been discussed. Petitioner did not allege that the information failed to charge a crime. He claims the information fails to charge the offense for which he is sentenced (See p. 30 printed petition). You cannot try a person for one crime and sentence him for another. However, it appears to be common practice in Michigan.

It is significant to note that during the preliminary examination DeWitt, as friendly with the prosecutor as two guys in the same kind of trouble, was a hostile witness toward the defense, withheld evidence and deliberately obstructed justice (28). During the trial, having had ample time within which to alter the descriptions to fit the prosecutions requirements, DeWitt blandly offered to produce them (131). This is merely one example of how the prosecution cunningly circumvented the genuine facts.

(2)

"STATE'S TESTIMONY"

Although at the close of the People's case (133-134) the prosecutor offered to produce other witnesses whose names appeared on the information, save those out of state, he carefully avoided mention of producing witnesses of the *res gestae*.

"EYE-WITNESSES"

The record is evidence of the fact that each "eye-witness" who identified Theodore Bentz as being one of the participants in the robbery *did not* tell "much the same story." The witnesses appallingly contradicted each other and, hazarding the perils of perjury, testified from their conception of the thing, identifying 6-foot Theodore Bentz because they had been induced to believe that it was he whom they saw when, in fact, they first had seen 6-foot Edward Bentz, who entered the bank with 5-foot two Lester Gillis. When Edward turned into Bolt's office, disappearing from their view, they saw in his place 5-foot nine Charles Fisher who, with 5-foot eleven Tom Murray, followed Edward Bentz and Lester Gillis into the bank, while 5-foot six Earl Doyle remained outside the rear door, according to Edward's lengthy affidavit signed in 1940 (See Exhibit "A" page 31).

Fisher, the new evidence shows, walked past the grille work, spoke to Martha Meschke, then walked over to the "east" wall desk where he apparently remained during the holdup. In the meantime, shows the new evidence, Murray stood near the front door and then walked over to Auditor Lindemulder's window, at which point he presumably gave orders to Lindemulder and Mrs. Sargent to lie down (Exhibit "A" pp. 31-32).

Theodore Bentz is a victim of mistaken identity being mistakeningly identified first for Ed, and then for Charles Fisher. Ed, having quickly disappeared into Bolt's office, confused these witnesses who assumed that Fisher was one of the first two men to enter the bank.

When the picture of Theodore Bentz was first shown to said bank employees, according to what Lieut. Hutson later disclosed, it was presently singly — not with others as the respondent would have you believe. Later, however, it was again presented among a number of pictures. Prior thereto, Edward Bentz's picture had been presented singly. He was positively identified by Bolt and others from the outset.

How do we explain that fact that Theodore Bentz's picture was singled out as a possible suspect? Two weeks after the robbery was perpetrated, the "get-away" car was found abandoned. In the pocket thereof officers found a drivers license. Lieut. Hutson, who was in charge of the investigation of the case, traced it to Edward Bentz who resided in Long Beach, Indiana, under some assumed name. When Hutson arrived there, of course Ed had fled. Thereupon Hutson sought out relatives who lived in nearby Michigan City, arrested one of them and "frightened him almost to death," by threatening to charge him with the crime if he wouldn't talk. This relative gave what information he could, investigation shows, and told Hutson that Theodore Bentz had visited with Edward a few days before the robbery occurred. Thus Lieut. Hutson suspected that Theodore Bentz might have been involved. Hutson forthwith obtained a picture of Theodore Bentz.

Whether said relative was able to give Hutson any information of Edward's accomplices is indicated by the fact that Hutson brought a picture of Lester Gillis into the bank shortly after the car was found. Gillis, as the new evidence shows, was the bandit who held up Welling. He, first to enter the bank with Ed, carried a "machine gun in a basket" (See Exhibit "A").

"WILLIAM H. PELLEGROM": This witness, as well as the others who identified Theodore Bentz as being one of the robbers, admittedly saw in the local newspaper a picture of petitioner before "they" identified him at the jail.

There are a host of cases, including the late Bertram Campbell case in New York, where bankers have thoughtlessly pointed a finger at an innocent person and positively declared him to be the man who committed or participated in the crime, only to discover, years later, he was not the man at all when another person confesses to the offense. In the Campbell case, one banker out of four who identified Campbell stubbornly refused to repudiate his identification even after Alexander D. L. Thiel who looked almost enough like Campbell to be him had confessed and "positively proved" that he and not Campbell committed the crime. Governor Dewey, the man who prosecuted Campbell, pardoned him.

It is significant to note that punctual Frederick Bolt, cashier of the bank in this case, did not identify Theodore Bentz. Nor did Lindemulder. Nor did a host of other witnesses who were present during the perpetration of the holdup.

Although Bolt, under cross-examination (78-81), testified he did not see the first two robbers enter the bank, he did see them after they once got inside. Reason he could not identify Theodore Bentz was because Theodore Bentz was *not* one of the bandits.

Lindemulder, like all other bank employees, saw *all* of the bandits in the bank. His testimony indicates this (85), where it is self-evident that his subconscious mind functioned to the reply before his conscious faculty had checked it. Said he: "I saw four, no, I didn't see four, I saw one, two, I saw two of them" as they came in and saw them again when he was outside. It is completely obvious that he had been coached. But why did not he identify Theodore Bentz? It so happens that Lindemulder, like Mr. Bolt, had some scrupulosity.

It should be borne in mind that every witness who identified Theodore Bentz as being one of the participants was an interested witness: thus inclined to satisfy the prosecution. The overzealous prosecutor, whose political ambitions have since proved to have existed at the time, had exactingly directed his witnesses prior to the trial as to which of them were to identify Theodore Bentz and where to place him in the bank, as the record flagrantly shows. Consequently, could any accused person obtain a fair trial under such a cabal arrangement?

(3)

"DEFENSE TESTIMONY"

Respondent failed to apprise this Court that both the prosecuting attorney and the trial judge brow-beat alibi witness Bailey. Bailey, being the first time in his life he appeared in a court room as a witness, was deliberately obfuscated by the exacting and shouting, leading questions of the prosecutor (106) took undue advantage of him.

Despite the prosecutor's artifice, Bailey's testimony was not discredited. Evidence shows petitioner hadn't moved into the apartment building where Bailey saw him until August 16th. Testimony elicited from Bailey by prosecutor to effect that he may have seen petitioner on August 11th was spoken under duress and while Bailey was confused. Bailey saw petitioner on Aug. 18th 1933 for the first time in his life and that was the last he saw of him until the trial. He remembered he got his pay check the following day for work he did in petitioner's apartment. The check was dated August 19th (99, 141). The apartment building's record confirmed that Bailey worked in petitioner's apartment only during the 18th day of August 1933.

Aaron Shugan (109-122) and Charles L. Knuth (122-133), who both testified on behalf of petitioner, were positive they saw petitioner in their store on August 18th, and that medicine petitioner purchased — rarely sold to a man — left a vivid impression of petitioner's visit in their minds as of that day. Their testimony was not shaken.

Petitioner's wife, Christina, who was born and reared in Scotland by religious parents, testified that petitioner was with her in the Chicago apartment when the crime in question occurred in Grand Haven, Michigan, more than 200 miles away (138-145). Her testimony is plain and truthful, was not discredited, despite the embarrassment under which she was placed. At her the prosecutor cast unwarranted aspersions.

And the fact that Earl Doyle testified (133.135) that he took part in the robbery, was acquainted with the identity of his associates in that robbery, and that Theodore Bentz was not one of them, is direct proof of not only petitioner's innocence but of the fact that he is a victim of mistaken identity. New evidence accquired since the trial fully corroborates the defense testimony, and yet the State has denied petitioner the right to have this evidence decided by a jury of petitioner's peers.

IV.

"ARGUMENT"

"Point One"

It is common practice in Michigan to deny a writ of habeas corpus on the pretense that one's remedy is by a belated motion for a new trial which is granted or denied at the discretion of only one, presumably the trial judge. If he — to speak frankly — does not feel like granting the motion, despite the merit of the points upon which it is based, he simply denies it. In his opinion, he can be as arbitrary as he may choose, not infrequently misstating facts. The procedure, in any case, does not preserve the constitutional right of movant to be treated in accordance with the law. Nor does it compare to the protection provided by habeas corpus. Nor does a discretionary appeal to the state appellate court from denial of a motion for a new trial safeguard rights deemed fundamental. For, if a convicted person cannot appeal as a matter of right, or, if he cannot obtain from the state appellate court a proper review, and is denied certiorari by the highest court in the land on a technical point of time, what other remedy might he seek save habeas corpus? Thus respondent's argument in this connection is not tenable.

Conceded, petitioner exhausted state remedies by belated motion for new trial, and attempted to get the State appellate court to review the arbitrary denial. But the fact remains that no court, except the trial judge, has ever reviewed this case and rendered a constituted opinion on the questions presented. Constitutional issues have been invariably disregarded. A bland, unsupported denial, made at the glance of one appellate court judge, is not just. Nor does the movant get any protection against the whims of that judge where the case is denied without review. How could petitioner be satisfied with anything but a just decision? Must an innocent person lie down and allow arbitrary courts to violate rights deemed fundamental and keep him in prison when such person has substantially proved his innocence and the fact that his trial was unfair?

When our forefathers framed the Constitution they fully intended that star chamber methods be absolutely discarded. Yet in this case, the state courts have virtually gone back to the reign of England's Charles the 1st to administer justice. No recognition has been given to the new evidence in this matter, nor does the respondent discuss it in his brief. If the law had been followed in rendering an opinion in this matter, there would be no need now to invoke the jurisdiction of the highest tribunal of the land. Since the State refused to follow the established doctrines of law, petitioner's course was clear. Either an innocent person can or cannot get justice in these United States. The question is substantially before the Court by virtue of the manner in which the questions presented are framed.

On page 20 of his brief respondent meekly asserts that "although several witnesses identified him as one of the robbers, he did not take the stand to deny the accusation." An accused person on trial must follow the advice of his attorney. He is not responsible for omissions of counsel upon whom he must rely. What right has the respondent to now disparage the doctrine that an accused person remaining silent is presumed to be innocent until proved guilty by competent evidence and before an unbiased jury in a court of qualified jurisdiction?

In Michigan, an accused person appears in the eyes of administrators of justice to be guilty if arrested for a crime, "otherwise he wouldn't have been arrested in the first place". And, if he does not take the witness stand, the untrained legal minds — and even many of the trained ones — suspect he is hiding behind a cloak of legal technicalities. A plea of *not guilty* is, under the law, sufficient to constitute a denial of any allegation made by the prosecution.

Respondent's unctuous assertion that petitioner filed a delayed motion for a new trial and was permitted to argue it, and had attempted to obtain a review of the denial in the State appellate court, only goes to show the *modus operandi* of the state courts in this cause has been superficial and a guise to make the public believe justice is being served.

Petitioner respectfully submits that respondent has failed to show where petitioner's first question doesn't have merit.

"Point Two"

Under this point respondent (21) hollowly declares that "there is no substance to any of the points raised in the petitioner's application to the court below for a writ of habeas corpus." A careful scrutiny of the facts and issues involved and the cases cited by petitioner show no "distorted notion" of his several grounds upon which he bases the two federal questions here presented.

The rules of this Court plainly state it is not permissible in an application for certiorari (or habeas corpus) to argue legal propositions where the matter is discussed in the supporting brief. The Court has repeatedly rebuked counsel for exploiting a petition for such purpose, since the purpose of the petition is merely to set out the claims and showing the court's right to exercise its jurisdiction to determine the merits of those claims. Thus "naked" legal conclusions in the applications itself, when argued by brief, is quite the proper procedure. And, as a matter of fact, all claims made by petitioner in his "application" are supported either by record or evidence or by *dehors* the record (See petitioner's printed petition page 19).

Since the remaining matters set out under this caption in respondent's brief are sufficiently covered by petitioner's brief supporting petition for certiorari, additional argument is unnecessary.

V.

"CONCLUSION"

Habeas corpus is available to an imprisoned person at any time, according to Constitution. Whether he has been confined for ten years or fifty is absolutely irrelevant. The Constitution provides that the States cannot abridge the right of the people to petition the Government for redress of grievances and that the privilege of a writ of habeas corpus cannot be suspended. Respondent State has refused to recognize these rights in this case. And has, un-

fortunately, disregarded the applicable decisions of this Court in rendering its opinions against petitioner's every legal move as well as in the administration of justice.

The purpose of the law is to maintain order, to advise people what is right and what is wrong. The purpose of the courts is to determine who is right and who is wrong, and such determination must be by due process of law. But where courts disregard the laws and their established interpretations and the judicial decisions of this Honorable Court, the course of this tribunal when called upon to order the corrective measures becomes clear. Otherwise the purpose for which this Court was founded will have failed by its mere reluctance to act in a situation which affects, by its far-reaching consequences, not merely this humble petitioner alone but those of impeccable character of high office who might one day find themselves in a like predicament with no manner in which to vindicate their innocence.

Petitioner, by virtue of all that has been presented here in this Honorable Court in this case, respectfully submits that the writ of certiorari should be issued accordingly.

Respectfully submitted,

THEODORE BENTZ,
Petitioner, Pro Se.